Making the Modern Criminal Law: A Response

In the long process of writing a book there develops a difference between the book that the author imagines themselves to be writing and the book that it is actually produced. The one is written in a lucid prose, each point is deftly and concisely made, arguments clearly set out and defended, and objections anticipated and dismissed. The actual book is inevitably less clearly argued, contradictory in parts, and where ideas are too often raised and left under-, or even un-, developed. The task of the reader is then to attempt to make sense of the printed page, and perhaps to show how the former can still be glimpsed in amongst the stumblings and hesitations of the latter. It is my great good fortune that my readers in this symposium have recognised both of these dimensions. They are generous in their reconstructions of the argument: identifying clear lines of argument and providing neat encapsulations of points that I wanted to make. And their criticisms are constructive: pointing out where I might have taken the argument or drawing attention to things that I overlooked as I struggled to draw the argument together. In doing this they close the gap between my 'imaginary' book and the actual printed book, and I am grateful to them for the generosity of their comments, as well as for providing me with this opportunity to revisit – and hopefully clarify – some of the original arguments.

A principal aim of the book is to develop a critical perspective on contemporary criminalisation debates – thinking about the proper scope of the criminal law or the factors that we should take into account when 'making' the criminal law – but in doing so it opens out into broader issues. First, I argue that even to think about 'criminalization' as a distinct question, as has now become commonplace in criminal law theory, requires that we have some prior conception of the relationship between criminal law, as a distinct body of rules with a defined area of application, and 'crime' as the object to be regulated.[1] Accordingly, one of questions that the book explores is how this understanding of the criminal law (and thus of the criminalization question) has developed. It thus looks at the question of how the modern criminal law – as a coherent, internally unified body of rules, distinct from other areas of law – was 'made' in the period since the late eighteenth century. This is not to claim that there were not laws relating to crime that were older, or that some of the rules and doctrines that were developed from the late-eighteenth century onward did not draw on long-established legal doctrines. It is, however, to argue that these rules were reconfigured in a new way into something that could newly be described as criminal law. This had both a descriptive and normative content: describing those rules that were understood by practitioners to be part of the criminal law, but also developing normative criteria by which it would be possible to judge whether or not a rule was 'properly' understood as a rule of criminal law. Criminal law is thus to be understood as something that is made, and which does not pre-exist the kind of institutional practices which make it.

This part of the argument is largely historical, looking at the development of the legal concepts and institutional structures, from rules of jurisdiction to concepts of criminal responsibility, which created an internal doctrinal or theoretical coherence. In doing so I also demonstrate that there have been different periods in the making of the modern law, in which the relationship between criminal law and its object has been thematised in different ways – and that these are also broadly connected to changes in the social function of the criminal law. This, at the very least, should alert theorists to the need for caution, when making claims about certain essential features or qualities of criminal law. These features, I hope to have

[1] For discussion see L Farmer, *Making the Modern Criminal Law. Criminalization and Civil Order* (Oxford: Oxford UP, 2016), Introduction.

shown, are much more contingent than is often assumed and should not be asserted unquestioningly in debates about criminalization.

A second set of arguments, is the claim that the development of the modern criminal law is linked to a more general aim of "securing civil order".[2] This is in part a claim that the scope of the criminal law, and hence of criminalization, cannot be understood solely in terms of the interests to be protected, but also requires reflection on the purposes or aims of that protection, on the kind of order that is being secured through law. I argue that theories of criminalization have focused on goods or interests (and wrongs or harms to these) at the cost of considering the aims of the law, and that a normative theory of criminalization should also address the question of aims. And I then go on to show in different area of the law (offences against property, the person, and sex) how beliefs about the aims of particular laws, and their contribution to 'civilising' conduct, have shaped legal development. More broadly this idea of securing civil order operates as a normative framework that opens up a different perspective on how the modern law has developed. Civil order, I argue, is a way of capturing the social imaginary of modern law, in which self-governing individuals are guided by general rules and interact in civil society and the market.[3] It is not an idea with a fixed content, as conceptions of what is or is not civil, and how this might best be secured, are contested and change over time; but the aim of securing civil order can nonetheless be seen as a relatively fixed aim of the modern criminal law. This idea of civil order also shapes the structure and content of laws, whether it be in terms of ideas of civility, 'civilized' social conduct, or their role in making or protecting civil society. The importance of the idea of securing civil order, then, for a normative theory of criminalization, is not that it is seeking to prescribe the form or content of the criminal law, but that it places normative questions about the scope of the criminal law within the institutional framework of modern society.

One of the questions raised by commentators is whether this framework over-simplifies, imposing a thematic and historical unity on the field. As Lacey suggests, the development of the criminal law might better be understood as a spectrum of developments rather than distinctive moments.[4] And Lacey, Papacharalambous and Ramsay all raise questions about my use of the term 'polycentrism' to describe "patterns of criminalisation which in different ways pull against, or raises questions about, unifying tendencies in the criminal law".[5] What, indeed, is the relationship between unifying and separating tendencies in the criminal law on my account? What is the purpose of the introduction of the term 'polycentrism' when my account is principally focused on detailing the efforts to systematise the criminal law?

The term 'polycentrism' is taken from George Fletcher's magisterial *Rethinking Criminal Law*, in which he suggested not only that there might be different patterns of liability in the development of the criminal law, but that the general part of the criminal law should be sensitive to this diversity.[6] While this raises the possibility of a different kind of criminal law theory – one that is more plural and is not looking for 'master' principles of responsibility, or criminalisation, or whatever else – the idea is undeveloped in Fletcher's work.[7] This, however, is something that I wanted to raise in my book. Much criminal law

[2] N MacCormick, *Institutions of Law* (Oxford: Oxford UP, 2007) p.293.

[3] C Taylor, *Modern Social Imaginaries* (Durham, NC: Duke UP, 2004).

[4] Lacey, p.5 (m/s).

[5] Farmer, *Making the Modern Criminal Law*, p.202. See Papacharalambous p.4; Lacey p.6; Ramsay p.13 & 21.

[6] (Boston, MA: Little, Brown Co, 1978) p.389.

[7] In fact, most of his work seems to cut against this idea as Part II of *Rethinking* is devoted to establishing a universalising account of the general part of the criminal law. See e.g. G Fletcher, *The Grammar of Criminal Law. American, Comparative and International* (Oxford: Oxford UP, 2007).

theory is understood as a search for general principle or the uncovering of a pre-existing unity – whether this be sought in moral and ethical theory or in legal practice – as properties which are in some way inherent to criminal law. By contrast to this, I attempt to show, on the one hand, that the search for unity is a distinctively modern project and, on the other hand, that different areas of law pursue different ends and that it is consequently neither easy nor necessarily desirable to draw them into some grand unifying project simply for the sake of unity itself. Normatively we should be wary of the demand for uniformity as it is not sensitive to aims of particular areas of the criminal law and may also, as I sought to show in relation to sexual offences, lead to further criminalisation.

This does not mean, however, that there may not be an underlying unity of a different kind, as Ramsay points out. I agree with his account of the existence of the underlying pattern of responding to "the vulnerability of law's subjects to the actions of others" – and how could I not, for I drew on his impressive work in *The Insecurity State*![8] However, I disagree with his claim as to its significance (or at least his suggestion that I have not recognised the logic or significance of my own argument). Both Carvalho and Ramsay point to this underlying pattern to suggest that there is a contradiction at the heart of the modern criminal law.[9] For Carvalho this lies in the contradiction between the role of the criminal law in both promoting and restricting freedom, which he sees as being linked to the contradictions of the civilising process itself – that it produces just those violent tendencies which it is continually seeking to repress. The criminal law, in other words, as it seeks to civilise, continually denies its own violence and its own contingency.[10] For Ramsay, the paradox is systematic of a deeper contradiction within liberalism itself and reveals the exhaustion and decay of the liberal project. He argues that a penal dystopia has taken the place of the ideal civil order as expanding civility and autonomy lead to the recognition of the need for protection of more interests and vulnerabilities – and an increased dependence on the state.[11] I do indeed acknowledge that there is a paradox, which is that despite the desire to limit state power criminal law has expanded in scope, more or less continually since the late eighteenth century.[12] However, by seeing this as a paradox rather than a contradiction I mean to place myself outside the kind of critical theory appealed to by both Carvalho and Ramsay. It is not that there is a fixed idea of liberal freedom which is continually undermined, but rather that in this tension the meaning of freedom is continually being reshaped.[13] As Papacharalambous recognises, the aim of my project was not to produce an overtly political critique of the criminal law of the kind which Ramsay and Carvalho envisage, and this is also why in the conclusion I shy away from offering the kind of prescriptive accounts of criminal law found in many theoretical accounts.[14] This may be a failing of the book in the eyes of some readers, but it is an approach that I would defend.

I want finally to comment on the question of the relationship between punishment and the criminal law. My aim in the book was to 'decouple' criminal law from punishment in the specific sense that I argue that the aims of the criminal law should not defined in terms of

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[8] Ramsay p.21 (m/s). See Ramsay, *The Insecurity State. Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford: Oxford UP, 2012).

[9] Papacharalambous makes a similar point (p.6) when comparing my approach to that of Alan Norrie – and suggesting that they converge. For a slightly different view see A Norrie, "Criminal Law and Ethics: Beyond Normative Assertion and its Critique" (2017) 80 *Mod LR* 955-73. I do not have space to address this question fully here.

[10] pp.5-7 (m/s).

[11] pp.5-10 (m/s).

[12] *Making the Modern Criminal Law*, p.298.

[13] See e.g. P Joyce, *The Rule of Freedom. Liberalism and the Modern City* (London: Verso, 2003).

[14] p.7 (m/s)

punishment.[15] I make this claim for a number of reasons: it places too much weight on moral philosophical justifications; that the criminal law performs social functions other than merely punishing wrongdoing; and because it leads us to neglect criminal law's public dimensions. However, as both Lacey and Carvalho point out, punishment keeps coming back in – both in general and to my own account – as both a justification for particular practices or reforms and as part of the general legitimatory framework of criminal law in the modern state.[16] This point is very well made, but I would nonetheless defend my approach. The argument for seeing the aims of criminal law and punishment as distinct should primarily be understood a conceptual distinction aimed at opening up space for broader reflection on the aims of the criminal law. I am not denying that there is a link in practice between criminal law and punishment, or indeed that state punishment must be justified. Rather, I seek to challenge the taken for granted nature of the linkage, by asking how (and when) the linkage has been made, and what are the consequences of the way that the conceptual link with punishment has been drawn. Why, for example, as Lacey points out, is the responsible subject of what I call contemporary 'neo-classical' criminal law seen as the 'punishable subject? My point here is that the focus on justified punishment of an individual offender obscures the social functions of criminal law in censuring certain forms of conduct, and the wider expansion of criminal liability.[17] More broadly, then, the aim of the project is to ask how we might develop a normative theory of criminal law if we begin from the fact of criminal law being a social institution rather than the 'fact' of punishment – and I am grateful to my commentators for their recognition of this point and their generous readings of the book.

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[15] *Making the Modern Criminal Law*, ch.1

[16] Lacey. pp.6-7 (m/s); Carvalho, p.7 (m/s).

[17] See now also V Chiao, *Criminal Law in the Administrative State* (New York: Oxford UP, 2018).